

The opinion in support of the decision being entered today was not written
for publication and is not binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WILLIAM P. APPS, JEFF WILKERSON
and BRIAN MUSSEY

Appeal No. 2002-1675
Application No. 09/439,427

ON BRIEF

Before STAAB, McQUADE, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 22 to
38, which are all of the claims pending in this application.

We AFFIRM with the affirmance constituting new grounds of rejection under
37 CFR § 1.196(b).

BACKGROUND

The appellants' invention relates to a pallet made of synthetic resin for use with a fork lift (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Sturgis	2,599,076	June 3, 1952
Fingerson	4,522,009	June 11, 1985
Pigott et al. (Pigott)	5,197,395	Mar. 30, 1993
Wyler et al. (Wyler)	5,868,080	Feb. 9, 1999

Claims 22, 23, 26, 29 to 31 and 34 to 37 stand rejected under 35 U.S.C. § 103 as being unpatentable over Pigott in view of Wyler and Fingerson.

Claims 24, 25, 27, 28, 32, 33 and 38 stand rejected under 35 U.S.C. § 103 as being unpatentable over Pigott in view of Wyler, Fingerson and Sturgis.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the answer (Paper No. 13, mailed August 22, 2001) for the examiner's complete reasoning in

support of the rejections, and to the brief (Paper No. 12, filed June 1, 2001) and reply brief (Paper No. 14, filed January 7, 2002) for the appellants' arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

In the brief (p. 3), the appellants stated that claims 22, 23, 26, 29 to 31 and 34 to 37 stand or fall together and that claims 24, 25, 27, 28, 32, 33 and 38 stand or fall together. In accordance with 37 CFR § 1.192(c)(7), we have selected claims 36 and 38 as the representative claims from the appellants' above-noted grouping of claims to decide the appeal on the rejections under 35 U.S.C. § 103. Accordingly, claims 22, 23, 26, 29 to 31, 34, 35 and 37 will stand or fall with claim 36 and claims 24, 25, 27, 28, 32 and 33 will stand or fall with claim 38.

Claim 36

We sustain the rejection of claim 36 under 35 U.S.C. § 103.

Claim 36¹ reads as follows:

A pallet having at least one deck member, the pallet prepared by a method comprising:
providing the at least one deck member having a first surface and a second surface; and
mechanically scuffing at least one of the first and second surfaces of the deck member to define a slip-resistant surface thereon.

Pigott's invention relates generally to pallets useful in material handling and more particularly to molded plastic pallets designed for use with forklift equipment. As shown in Figures 1-4, a plastic pallet 10 includes two identical decks 12 that are interconnected by identical connectors 14. Each connector includes a central core 20 and a surrounding sleeve 44 interconnected by spokes 46. The core has flexible tangs 28 that extend beyond opposite ends of the sleeve and lock onto the deck.

Fingerson's invention relates to a flooring grating wherein the bearing members of the grating are retained in a predetermined-spaced relationship by interconnecting

¹ Claim 36 is a product-by-process claim. Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. See *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Once the appellants have been provided with a rationale tending to show that the claimed product appears to be the same or similar to that of the prior art, although produced by a different process, the burden shifts to the appellants to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product. See *In re Marosi*, 710 F.2d 799, 803, 218 USPQ 289, 292-93 (Fed. Cir. 1983).

members including cooperating key rod members and lock rod members adhesively bonded together. As shown in Figures 1-3, the flooring grating 10 includes a plurality of spaced, generally parallel flooring members 12 also referred to as support members or bearing members. The flooring members 12 are connected together in a grating construction by a plurality of interconnecting structures 14. The interconnecting structures 14 include a central core member 16, or key rod adhesively bonded to two outer spacer members 18, or lock rods, by a suitable, flexible adhesive 19. The flooring members 12 include a base portion 20, a web portion 22 and an upper flange portion 24. Each of the flooring members 12 has a plurality of apertures 26 extending transversely therethrough. Each of the interconnecting structures 14 extends through sets of the apertures 26 in the web portion 22 of the flooring members 12 which are in relative alignment. Fingerson teaches (column 6, lines 5-8) that the upper surface of the upper flange portions 24 may be roughened or coated with another material so as to provide an increased gripping surface for the flooring grating.

Wyler's invention relates in general to pallets for storing and transporting goods, and more particularly, to a reinforced plastic pallet and fabrication method wherein reinforcing members comprising composite structural members of fiberglass reinforced

plastic are employed in various configurations. In the Disclosure of Invention section of the patent (column 1, line 56, to column 2, line 52), Wyler provides

Briefly summarized, the invention comprises in one aspect a reinforced plastic pallet having a molded plastic pallet body with at least one channel formed in an upper surface thereof. At least one reinforcing bar is provided sized to reside within the channel formed in the upper surface of the molded plastic pallet body such that the reinforcing bar has an exposed surface at the upper surface of the molded plastic pallet body. Preferably, the exposed surface of the reinforcing bar comprises an anti-skid surface to inhibit movement of payload disposed on the reinforced plastic pallet. The reinforcing bar may comprise a composite structural member of fiberglass reinforced plastic fabricated from a pultrusion process.

In another aspect, the invention comprises a reinforced plastic pallet having a molded plastic body with at least one channel formed in a lower surface thereof and at least one reinforcing bar sized to reside within the at least one channel. The reinforcing bar has an exposed surface at the lower surface of the molded plastic pallet body when the bar is positioned within the at least one channel. Preferably, the exposed surface of the at least one reinforcing bar comprises an anti-skid surface for engagement with a forklift tine and/or pallet jack interface.

In a further aspect, a reinforced plastic pallet is provided wherein a molded plastic top deck and a molded plastic bottom deck are secured together. The molded plastic bottom deck has at least one channel formed in a lower surface thereof. At least one reinforcing bar is sized to reside within the at least one channel formed in the lower surface of the bottom deck such that the reinforcing bar has an exposed surface at the lower surface of the bottom deck. Preferably, the exposed surface comprises an anti-skid surface for ensuring non-slip contact with a floor or racking structure.

Provided herein are various implementations of an improved reinforced plastic pallet and method of assembly. The plastic pallet includes multiple reinforcing bars, preferably fabricated of fiberglass reinforced plastic produced

from a pultrusion or molding process. Advantageously, a surface of each reinforcing bar can remain exposed above an upper surface of a single or dual deck pallet design to provide an anti-skid surface for payload disposed on the pallet. Reinforcing bars could also or alternatively be disposed to provide an exposed surface on the underside of the payload surface, again to establish an anti-skid surface in combination with providing structural support for the pallet. This anti-skid surface would be engaged by forklift tines and/or a pallet jack interface/handling mechanism to prevent slippage of the pallet when being moved. Reinforcing bars can also be disposed at a lower surface of a runner structure or lower deck so that an exposed anti-skid surface is provided to contact a floor or racking structure, for example, to facilitate use of the pallet with automated warehouse handling equipment.

Figure 1 of Wyler presents an exploded view of a reinforced plastic pallet 10.

Pallet 10 includes a generally rectangular-shaped molded plastic pallet body 12 with a single top deck 14 supported by three runners or leg structures 16a, 16b, and 16c. The runners extend parallel to a short or Y axis and define parallel recesses 18 on the underside of pallet 12 for receiving, for example, forklift tines to facilitate pallet handling. Deck 14 may be provided with various patterns of supporting ribs 22, drainage holes 24 and/or hand holds 26. Pallet body 12 preferably comprises a unitary structure molded from recycled and/or virgin commodity plastic, e.g., high density polyethylene using a structural foam or injection molding process or other known forming process. Bottom side anti-skid strips 28, of known construction, can be adhered or otherwise secured along the lengths of runners 16a and 16c and across recesses 18, as shown in order to reduce skidding of pallet 10 on a supporting surface and/or forklift tines.

The upper surface 20 of Wyler's deck 14 is provided with multiple parallel channels 30 extending along the long or X-axis. Channels 30 are formed as part of the molding process and are configured to receive and support corresponding reinforcing bars 32. Reinforcing bars 32 comprise elongated structural members made of composite material such as fiberglass reinforced plastic fabricated from a pultrusion process. Reinforcing bars 32 have an exposed generally planar top surface 34 which is substantially parallel to and, preferably, coplanar or slightly elevated with respect to upper surface 20 of deck 14. Wyler teaches (column 4, lines 16-20) that the exposed surface 34 of each reinforcing bar 32 preferably comprises an integral anti-skid surface 36, formed e.g., by knurling or roughening, and/or with anti-skid material. The anti-skid surface 36 serves to limit payload movement on the upper surface 20 of pallet 10.

Wyler further teaches (column 5, lines 36-61) that

The composite reinforcing bars of the present invention which provide not only increased integrity and strength to the plastic pallet but also enhanced anti-skid properties can be mounted in various locations in the pallet body depending upon the desired application. FIGS. 7A-7F illustrate three different scenarios for single deck and dual deck pallets. When it is desired to limit movement of a load on top of the pallet (Scenario 1), reinforcing bars 32 can advantageously be mounted in upper surface 20 of top deck 14 of either a single deck (FIG. 7A) or dual deck (FIG. 7D) pallet. To limit movement of the pallet upon forklift tines or at a pallet jack interface (Scenario 2), reinforcing bars 32 can be mounted in pallet body 16 so that the anti-skid surface of the bars is exposed at a lower surface 66 of top deck 14, in either a single deck (FIG. 7B) or a dual deck (FIG. 7E) pallet. To reduce movement of the pallet on a floor surface (Scenario 3), e.g. a metal floor of a moving vehicle, reinforcing bars 32 can be mounted at the lower surface of runners 16 in a single deck pallet (FIG. 7C) or

the lower surface of a bottom deck 68 of a dual deck pallet (FIG. 7F) so that the anti-skid surface of the bars 32 rest on the floor surface. Such reinforcing bars with their exposed anti-skid surfaces can also be concurrently applied to multiple surfaces of the pallet, i.e. upper surface 20 of top deck 14, lower surface 66 of top deck 14, and/or lower surface 70 of runner 16 or bottom deck 68.

Figure 12 of Wyler shows a reinforcing bar 32 having an exposed anti-skid surface 36 mounted to the underside 66 of a top deck 14 in a dual deck pallet 10'. Bottom deck 68 is secured to the lower side 66 of top deck 14 using legs 72. Legs 72 also sandwich and serve to retain reinforcing bars 32 in their desired location on the underside of top deck 14. Bottom deck 68 and legs 72 may comprise a single unitary runner structure which is secured over a portion of each reinforcing bar 32 trapping the reinforcing bars between the top deck 14 and the runner structure.

After the scope and content of the prior art are determined, the differences between the prior art and the claims at issue are to be ascertained. Graham v. John Deere Co., 383 U.S. 1, 17-18, 148 USPQ 459, 467 (1966).

Based on our analysis and review of Pigott and claim 36, it is our opinion that the difference is that Pigott's pallet does not have a deck member in which at least one of the surfaces of the deck member is mechanically scuffed to define a slip-resistant surface thereon.

Based on our analysis and review of Wyler and claim 36, it is our opinion that there is no difference. In our view claim 36 is readable on² Wyler as follows:

A pallet (Wyler's pallet 10) having at least one deck member (either one of Wyler's reinforcing bars 32 or Wyler's deck 14 and reinforcing bars 32 taken together), the pallet prepared by a method comprising: providing the at least one deck member having a first surface and a second surface (Wyler's reinforcing bar 32 has a top surface 34 and a bottom surface); and mechanically scuffing at least one of the first and second surfaces of the deck member to define a slip-resistant surface thereon (Wyler's top surface 34 of reinforcing bar 32 is an anti-skid surface 36 formed by roughening or knurling).

The only possible distinction between Wyler and claim 36 is the limitation that at least one of the first and second surfaces of the deck member is mechanically scuffed to define a slip-resistant surface thereon. It is our view this limitation is not restricted to mechanically scuffing either the entire upper or lower surface of the deck member (e.g.,

² A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. Verdegaal Bros. Inc. v. Union Oil Co., 814 F.2d 828, 831, 2 USPQ2d 1051, 1053 (Fed. Cir.), cert. denied, 484 U.S. 827 (1987). The inquiry as to whether a reference anticipates a claim must focus on what subject matter is encompassed by the claim and what subject matter is described by the reference. As set forth by the court in Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984), it is only necessary for the claims to "read on" something disclosed in the reference, i.e., all limitations of the claim are found in the reference, or 'fully met' by it."

Wyler's upper surface 20 of deck 14). Instead, this limitation requires only that any surface of a deck member of a pallet be mechanically scuffed to define a slip-resistant surface thereon. Since Wyler's top surface 34 of reinforcing bar 32 of pallet 10 is roughened or knurled to form an anti-skid surface 36, it is our view that the subject matter of claim 36 is met by Wyler.

For the reasons set forth above, we have concluded that Wyler teaches all the limitations of claim 36. A disclosure that anticipates under 35 U.S.C. § 102 also renders the claim unpatentable under 35 U.S.C. § 103, for "anticipation is the epitome of obviousness." Jones v. Hardy, 727 F.2d 1524, 1529, 220 USPQ 1021, 1025 (Fed. Cir. 1984). See also In re Fracalossi, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982); In re Pearson, 494 F.2d 1399, 1402, 181 USPQ 641, 644 (CCPA 1974). Accordingly, the decision of the examiner to reject claim 36 under 35 U.S.C. § 103 is affirmed.

In accordance with 37 CFR § 1.192(c)(7) and the appellants' grouping of claims 22, 23, 26, 29 to 31 and 34 to 37, claims 22, 23, 26, 29 to 31, 34, 35 and 37 fall with claim 36. Thus, it follows that the decision of the examiner to reject claims 22, 23, 26, 29 to 31, 34, 35 and 37 under 35 U.S.C. § 103 is also affirmed.

Inasmuch as the basic thrust of our affirmance of the 35 U.S.C. § 103 rejection of claims 22, 23, 26, 29 to 31 and 34 to 37 differs from the rationale advanced by the examiner for the rejection, we hereby designate the affirmance to be a new ground of rejection pursuant to 37 CFR § 1.196(b) to allow the appellants a fair opportunity to react thereto (see In re Kronig, 539 F.2d 1300, 1302-03, 190 USPQ 425, 426-27 (CCPA 1976)).

Claim 38

We sustain the rejection of claim 38 under 35 U.S.C. § 103.

Claim 38 reads as follows:

The pallet of claim 36, wherein scuffing includes brushing the at least one surface with at least one wire brush.

It is our determination that these method of making limitations do not affect the product itself (i.e., the claimed pallet) and therefore cannot impart patentability to the product. See In re Thorpe, supra. Thus, the subject matter of claim 38 is anticipated by Wyler for the reasons set forth above with respect to parent claim 36. Since the appellants have now been provided with a rationale tending to show that the claimed product appears to be the same as that of the prior art, although produced by a different process, the burden has shifted to the appellants to come forward with

evidence establishing a difference between the claimed product and the prior art product. See In re Marosi, supra. This the appellants have not yet done.

For the reasons set forth above, the decision of the examiner to reject claim 38 under 35 U.S.C. § 103 is affirmed. In accordance with 37 CFR § 1.192(c)(7) and the appellants' grouping of claims 24, 25, 27, 28, 32, 33 and 38, claims 24, 25, 27, 28, 32 and 33 fall with claim 38. Thus, it follows that the decision of the examiner to reject claims 24, 25, 27, 28, 32 and 33 under 35 U.S.C. § 103 is also affirmed.

Inasmuch as the basic thrust of our affirmance of the 35 U.S.C. § 103 rejection of claims 24, 25, 27, 28, 32, 33 and 38 differs from the rationale advanced by the examiner for the rejection, we hereby designate the affirmance to be a new ground of rejection pursuant to 37 CFR § 1.196(b) to allow the appellants a fair opportunity to react thereto.

CONCLUSION

To summarize, the decision of the examiner to reject claims 22 to 38 under 35 U.S.C. § 103 is affirmed with the affirmance constituting a new ground of rejection under 37 CFR § 1.196(b).

This decision contains a new ground of rejection pursuant to 37 CFR § 1.196(b). 37 CFR § 1.196(b) provides that, "[a] new ground of rejection shall not be considered final for purposes of judicial review."

37 CFR § 1.196(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (§ 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. . . .


(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

No time period for taking any subsequent action in connection with this appeal
may be extended under 37 CFR § 1.136(a).

AFFIRMED; 37 CFR § 1.196(b)


LAWRENCE J. STAAB
Administrative Patent Judge


JOHN P. McQUADE
Administrative Patent Judge


JEFFREY V. NASE
Administrative Patent Judge

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